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In the Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellants

v.

JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE, *et al.*,
Appellees

On Appeal from the Supreme Court of Pennsylvania

REPLY BRIEF FOR THE APPELLANTS

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REPLY BRIEF FOR THE APPELLANTS

I. INTRODUCTION.

Because Pennsylvania's defense of the challenged taxes largely ignores the policies that underlie the Commerce Clause, we begin by refocusing the inquiry on those central considerations. Simply stated, the Commerce Clause is designed to create a national common market and to ensure that businesses are not placed at a competitive disadvantage merely because their operations cross state borders. Under the Commerce Clause, state borders "are to be considered irrelevant." *Commonwealth Edison*, 453 U.S. at 619.

The axle tax and marker fee utterly fail to satisfy these principles. Because they are fixed in amount irrespective of the extent of highway use, the levies bear no relation to the presence and activity of interstate truckers within Pennsylvania or to the highway wear and tear they cause. As a result, they impose a far greater effective tax rate upon interstate truckers, who spread their operations over numerous states.

In addition, because they are unapportioned and not subject to reciprocity, flat taxes such as these must be paid over and over, in full amount, as a truck crosses from one flat tax state to another. Thus, an interstate trucker today must pay not only the registration fee in his state of domicile, but also flat tax exactions totalling $655 for each large truck in his fleet ($180 to Pennsylvania, $175 to Arkansas, $150 to Kentucky, $50 each to Indiana and Vermont, and $25 each to Maryland and New Jersey). These cumulative burdens on commerce are not an insubstantial or merely theoretical concern. Amicus North American Van Lines, for example, paid more than $1.25 million in flat taxes to Arkansas and Pennsylvania alone in a single year—nearly $1 million more than an otherwise identical intrastate company would have paid. See Yellow Freight Am. Br. 7-9 & n.3.

Not satisfied with having chosen to finance reconstruction of its bridges by a tax that imposes a far greater cost per mile on out-of-state truckers, the Pennsylvania legislature compounded the discrimination by simultaneously reducing the registration fees for Pennsylvania vehicles to eliminate the impact on them of the new axle tax. It thereby thrust the burden of the axle tax onto out-of-state taxpayers, who must finance virtually all of the State's bridge reconstruction program.

If the Court were to place its imprimatur on Pennsylvania's actions, other state legislatures concerned with finding new sources of revenue while alleviating the tax burdens of their own constituents would be encouraged to follow suit, shattering the Commerce Clause objective of placing local and interstate business on a level plane. The more a trucker participates in a national market by expanding the scope of his operations across state boundaries, the more he is exposed to repeated doses of discriminatory and cumulative state taxation. Especially given the centrality of interstate trucking to national commerce, such discriminatory taxes present the paradigmatic case for intervention by this Court.

Unable to justify this discrimination, Pennsylvania and its amici in the end resort to repeated, and significant, mischaracterizations of our position:

• The principles we espouse would not "freeze" state tax systems in their present form, preclude "rational restructuring" of inequitable burdens, or require states to achieve "perfect equality" in their highway tax systems. We ask only what we believe the Commerce Clause requires: that the states avoid discrimination when they seek to adjust tax burdens, particularly when nondiscriminatory alternatives are readily available.

• Our position does not restrict the *amount* of revenues a state may raise through highway taxes. Nor is it designed to favor large trucking companies at the expense of smaller ones (most ATA members operate fleets of fewer than 50 vehicles) or to favor heavy trucks over

other highway users. Pennsylvania can make trucks pay taxes commensurate with the wear and tear they cause. But it cannot impose a far lower relative tax burden on locally-based trucks than on otherwise identical trucks based outside the state.

• Our arguments are not part of a grand strategy to frustrate state collection of highway taxes, nor is this even remotely a case of the trucking industry versus the states. As evidenced by the amicus briefs filed by Oklahoma and by North Carolina and Utah, many states protest Pennsylvania's discriminatory taxes and find such taxes to be completely unnecessary to finance their own highway systems. Even Pennsylvania's own amici (all of them flat tax states) are not of one mind on the matter. New Jersey attacks both taxes (Br. 2, 7-8) because they are not actually paid by Pennsylvania trucks. Pennsylvania and Arkansas urge the invalidity of retaliatory taxes, while New Jersey defends them. And Vermont, supremely hypocritical, defends Pennsylvania's taxes without mentioning that it has retaliated against trucks registered in Pennsylvania by subjecting them to a mirror-image axle tax. Vt. Stat. Ann. tit. 23, § 3021 (Supp. 1985).

II. PENNSYLVANIA HAS FAILED TO DEMONSTRATE THAT DISCRIMINATORY FLAT HIGHWAY TAXES ARE JUSTIFIED.

A. Because Pennsylvania and its amici focus largely on the constitutionality of flat highway taxes, and because the flat tax issue relates to both the marker fee and the axle tax, we take up that issue first. Flat highway taxes present a quintessential example of "burdens of such a nature as to be capable, in point of substance, of being imposed or added to with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce." *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 255-256

(1938) (citations omitted). Thus, a flat highway tax "in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed." *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U.S. 434, 439 (1939). "To prevent disadvantaging operations that straddle political boundaries, [the Court] ban[s] such flat-rate taxes." Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1188 (1986).

Pennsylvania's response to the critical issue of cumulative burdens is simply to ignore the problem. Its entire discussion of the subject is contained in a single paragraph (Br. 32-33) in which it asserts that the cumulative burden argument is "without factual foundation and . . . irrelevant." There is no need for "factual foundation," however, because such taxes are *inherently* discriminatory in character (see *Nippert*, 327 U.S. at 427-431) and violate the modern Commerce Clause principle of "internal consistency" applied in *Armco*. There, the Court struck down West Virginia's wholesaling tax because of the *potential* impact of adoption of similar taxes by other states, although Armco actually paid no more tax to West Virginia than in-state manufacturers and had not shown that it was actually subject to duplicative taxation elsewhere. See also *Conway*, 508 A.2d at 412 (applying the internal consistency principle to state highway taxes). For interstate truckers, of course, the cumulative burdens are not hypothetical; they now have to pay flat highway taxes to six states in addition to Pennsylvania. See Canadian Trucking Assoc. Am. Br. 7.

Though the discrimination inherent in flat taxes makes it unnecessary to prove actual discrimination, in fact the record here graphically confirms it. See ATA Br. 33-34. Notwithstanding Pennsylvania's specious arguments on this point (Br. 35-38), even its own evidence showed that Pennsylvania-registered trucks were responsible for 51% of all miles driven on the State's highways

by trucks weighing over 17,000 pounds (J.A. 200) but made only 16% of total axle tax payments (J.A. 207). There is no explanation for this disparity other than the discriminatory operation of the axle tax.

Pennsylvania (Br. 2 n.2, 12, 35-36) and Arkansas (Br. 2-4, 10, 12) attempt to blunt the force of these statistics by arguing that a company often has great latitude in choosing where to register its trucks (but see J.A. 239-243) and that in-state and out-of-state registration do not correspond precisely to intra- and interstate commerce. But the fact that some Pennsylvania-registered trucks are engaged in interstate carriage is quite beside the point, because it is impermissible to favor a local company over an out-of-state company even if both participate in interstate commerce. See *Boston Stock Exchange*, 429 U.S. at 335. Moreover, the Commerce Clause condemns a tax that discriminates generally, even though not perfectly, between in-state and out-of-state taxpayers. *BT Inv. Managers, Inc.*, 447 U.S. at 40, 42-43 & n.9. In short, state of registration is a satisfactory proxy for the relevant classes to which Commerce Clause protections apply.

B. Pennsylvania's principal justification of its flat taxes is that, when registration fees are also considered, "trucks registered in Pennsylvania clearly pay a higher price for the use of Pennsylvania highways than do trucks registered in other States" (Pa. Br. 11). Invoking alleged considerations of fairness, the State contends that any discrimination against interstate commerce inherent in flat taxes is "fair" because it is offset by discrimination against local commerce caused by registration fees. This argument embodies a fundamental misunderstanding of registration fees.

First, Pennsylvania has entirely ignored the fact that every truck must pay a registration fee somewhere, and that a portion of that fee pays for the right to travel the highways of other states. Indeed, under the IRP, trucks base-plated in other states pay a share of Pennsylvania's

registration fee, measured by the proportionate extent of their use of Pennsylvania's highways. Since such vehicles pay an appropriate share of Pennsylvania's registration fee directly, it is untenable to subject them to other, discriminatory taxes on the ground that in-state trucks also pay Pennsylvania's registration fee.

Where reciprocity is the basis for travel in Pennsylvania, the payment of Pennsylvania registration fees is constructive, but no less real in economic terms. "In a practical economic sense, reciprocity represents an indirect contribution by foreign-based trucks to the treasury of the State of [Pennsylvania]; the agreement of their home states not to tax [Pennsylvania]-based trucks leaves [Pennsylvania] free to collect more than it otherwise could from its own truckers." *Quinn*, 437 A.2d at 627.

The economic reality is that, under either IRP or reciprocity, trucks base-plated in states other than Pennsylvania pay a fair share of Pennsylvania's registration fees; at the same time, a proportionate share of Pennsylvania's registration fee is allocable to travel by Pennsylvania-based trucks in other states. This is the uniform holding of *Quinn* and the other state supreme court decisions cited at pages 23-24 of our opening brief, to which Pennsylvania offers no response.

Accordingly, while it is true that the registration fee is in one sense a flat tax, apportionment and reciprocity eliminate the risk that cumulative penalties will attach to the decision to operate in interstate commerce. It is this factor, which Pennsylvania and its amici stubbornly refuse to recognize (*e.g.*, N.J. Br. 12-13), that fundamentally differentiates the flat taxes challenged in this case from registration fees. Indeed, the "flatness" of taxes like the marker fee and the axle tax would be unobjectionable if those taxes were apportioned or subject to reciprocity, as registration fees are.

In sum, because registration fees do not discriminate between intra- and interstate commerce, they cannot be

used to justify discriminatory flat taxes. Put another way, if the marker fee and axle tax standing alone discriminate against interstate commerce, as they surely do, they cannot be salvaged by reference to the rest of Pennsylvania's highway tax system, which imposes *no* countervailing discrimination on Pennsylvania-registered trucks.

C. The other prop on which Pennsylvania rests its defense of flat taxes is the old *Aero Mayflower* line of cases. In response to our demonstration that these precedents have been undermined by operational changes in the interstate trucking business and by the modern evolution of Commerce Clause jurisprudence, the defenders of flat highway taxes make the following claims:

1. Pennsylvania argues (*e.g.*, Br. 31) that the rationale of the *Aero Mayflower* line of cases—that flat taxes should be tolerated because of the unavailability of practical, readily administrable, non-discriminatory alternatives—remains valid. Assuming arguendo that today's Court would uphold, on grounds of administrative convenience, a tax that discriminates markedly against interstate commerce, this argument is nevertheless unavailing. All but seven states now manage to raise adequate highway revenues without flat taxes, and Pennsylvania, like every other state, has a system of fuel taxes already in place, complete with reporting and enforcement mechanisms that are "reasonable, cost-effective, [and] easily administered." No. Car. & Utah Am. Br. 7. Simply increasing the rates of those taxes would not introduce substantial new administrative or compliance problems.

Apparently believing it has caught ATA in a contradiction, Vermont makes much (Br. 10-12) of ATA's opposition to so-called "weight-distance" taxes. But there is no inconsistency. That opposition is based on policy objections, not constitutional grounds. While weight-distance taxes are not inherently discriminatory against interstate commerce, they are far more difficult and

costly to administer than fuel taxes, and they are no fairer as a measure of highway wear and tear; fuel taxes are also much less likely to be evaded, because they are collected in advance, usually at the pump. Vermont's assertion (Br. 15 n.23) that many trucks today file no mileage reports is largely irrelevant. It overlooks the fact that intrastate operators pay their state's fuel tax at the pump and, because they travel little if at all outside the state, need not file reports for purposes of determining fuel use tax payments to other states. See J.A. 168-169, 233-234.

2. Related to the foregoing argument are the repeated assertions by Pennsylvania (Br. 9-10) and its amici (Ark. Br. 8-9; Ky. Br. 16-17; N.J. Br. 16) that: (a) trucks in general, and heavy trucks in particular, fail to pay their fair share of highway maintenance costs; and (b) raising fuel taxes, even if wholly feasible, would not solve this problem because, although the amount of fuel tax paid undeniably varies with both weight and mileage, fuel consumption allegedly does not increase with weight to the same extent as highway wear and tear. Whatever the merits of these hotly disputed and unresolved questions of engineering and economics, they are wholly irrelevant to the Commerce Clause issues before this Court.

First, the alleged problem with fuel taxes is spurious. If a state concludes that the fuel tax fails to impose a fair share of highway maintenance costs on heavier vehicles, it need only do as Kentucky and other states have done and impose a surcharge on the fuel tax for such vehicles (see Ky. Br. 4). Second, and more fundamentally, even if a state tax system were to favor heavy trucks over light trucks or trucks over automobiles (or, as Arkansas suggests (Br. 7-8), large, efficient companies over smaller operators), such attributes would not implicate the concern of the Commerce Clause—to avoid discrimination favoring local over interstate commerce. What is relevant is not whether large trucks or small

ones benefit from the tax system, but why two identical trucks, traveling the same number of total miles and causing the same amount of highway wear and tear, should have dramatically different per-mile axle tax or marker fee costs simply because one confines its operations largely or entirely to Pennsylvania while the other operates extensively in interstate commerce. Pennsylvania and its amici offer no answer to that question.

3. Pennsylvania and its amici also rely on references to the *Aero Mayflower* line of cases in *Evansville* and *Massachusetts*, even though neither case involved the kind of issue presented here. It is ironic (and revealing) that *Evansville* should be described as a flat tax case (*e.g.*, Pa. Br. 25; Vt. Br. 20) when the one dollar per-passenger airport tax at issue there was in fact the very model of a non-discriminatory tax—apportioned to the level of passenger traffic and thus to the extent of actual use of the facility. And not only did *Massachusetts* not involve a Commerce Clause issue, but the federal tax challenged there presented a fundamentally different situation: first, there was but a single taxing authority, and therefore no risk of cumulative tax burdens; second, there was no concern that the taxpayer would suffer discrimination at the hands of a government in which it had no voice.

D. In the end, Pennsylvania's flat taxes will stand or fall on the basis of this Court's judgment whether the *Aero Mayflower* line of cases—cases from another era of Commerce Clause jurisprudence—retains vitality today. The Court has had no occasion to revisit this issue since *Capitol Greyhound*. Much has happened in the interim, notably the watershed ruling in *Complete Auto*.

Under *Complete Auto*, all state taxes burdening interstate commerce must pass a four-part test designed to assess "the practical effect of the tax." 430 U.S. at 278. This "consistent and rational method of inquiry" (*Commonwealth Edison*, 453 U.S. at 615) requires both that a tax not discriminate against interstate commerce and

that "the *measure* of the tax must be reasonably related to the extent of the [taxpayer's] contact" with the taxing state (*id.* at 626). "[W]hen the measure of a tax bears no relationship to the taxpayers' presence or activities in a State . . . the State is imposing an undue burden on interstate commerce" (*id.* at 629). By the same token, a tax must have "internal consistency"—*i.e.*, "the tax must be such that, if applied in every jurisdiction, there would be no impermissible interference with free trade." *Armco*, 467 U.S. at 644. It is by these modern tests—not the tests articulated in cases decided decades ago—that the axle tax and marker fee must be evaluated.

Pennsylvania's response to *Complete Auto*, *Commonwealth Edison*, and *Armco* is the bold claim that highway user taxes are somehow completely exempt from their requirements and instead subject solely to an excessiveness test derived from the old cases (see Pa. Br. 25-27). This apparently means, in the view of Pennsylvania and its Supreme Court (see J.S. App. 29a, 34a), that the Commerce Clause is not violated so long as the amount collected from trucks registered outside Pennsylvania does not exceed the costs of repairing Pennsylvania's bridges and maintaining its highways—and never mind that Pennsylvania-registered vehicles are not called upon to carry their proportionate share of these expenses.

The viability of this extraordinary conclusion depends upon Pennsylvania's assertion that when the Court in *Commonwealth Edison* "put to one side" cases involving user fees (453 U.S. at 621-622), it meant to exempt such fees from the *Complete Auto* test. In order to appreciate how implausible Pennsylvania's construction is, the "put to one side" language must be placed in context. In *Commonwealth Edison*, the plaintiffs challenged Montana's severance tax on coal on the ground that it was excessive in relation to the services provided to mining companies by the State, and the plaintiffs expressly relied (Appellants' Br. 32) on the excessiveness

limitation in user charge cases. In rejecting this challenge, the Court held that, because Montana's severance tax was a general revenue tax rather than a user charge, the *amount* of the tax did not have to be tied to the value of the services provided or the extent of the costs incurred by the State due to the taxed activity. Instead, the Court held (453 U.S. at 626, 629) that it was the *measure* of the tax that had to bear a reasonable relation to the taxpayer's presence.

The language relied on by Pennsylvania simply distinguishes user charges from general revenue taxes. Because the Court had no intention of sanctioning user charges that were excessive in relation to the value of the services provided, the Court put such cases "to one side." The Court would surely have been astonished to learn that it was thereby endorsing user charges that violated the third or fourth prongs of *Complete Auto*. Rather, the Court was making clear that such taxes would remain subject to an *additional* excessiveness requirement.

The defenders of flat highway taxes also venture (*e.g.*, Ark. Br. 16) that such taxes do satisfy the fourth prong's "reasonably related" test because they are laid on the "privilege" or "opportunity" to use the taxing state's highways rather than on any actual use. In fact, however, *Complete Auto* discarded the formalistic touchstone of "privilege" in favor of realistic economic analysis of tax effects. It would be a total perversion of the Commerce Clause policies underlying that decision to find that it endorsed a tax on "privilege" wholly unrelated in its measure to the extent the taxpayer actually uses the privilege.

E. Finally, Pennsylvania urges the Court (Br. 33) to leave the question of the constitutionality of flat highway taxes to Congress. This Court has repeatedly rejected such arguments and overruled outdated Commerce Clause precedents (see ATA Br. 47 n.22). As the Court stated in *Washington Stevedoring*, in words that are equally apt here (435 U.S. at 749):

> [R]espondents suggest that what they regard as such an important change in Commerce Clause jurisprudence should come from Congress and not from this Court. To begin with, our rejection of the *Stevedoring Cases* does not effect a significant present change in the law. The primary alteration occurred in *Complete Auto*. Even if this case did effect an important change, it would not offend the separation-of-powers principle because it does not restrict the ability of Congress to regulate commerce.

See also *Japan Line, Ltd.* v. *Los Angeles*, 441 U.S. 434, 454 (1979) ("where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests"). Indeed, in a report cited by Vermont (Br. 5-6), the Department of Transportation and the ICC recognized that the Commerce Clause makes courts "responsible for ruling on the merits of state requirements . . . in the absence of congressional direction." *Report to Congress on Uniform State Regulations Pursuant to Section 19 of the Motor Carrier Act of 1980*, at iii (1982).

Moreover, contrary to the impression Vermont seeks to convey (Br. 3-9), Congress has not undertaken to resolve the interstate tax issues presented here. The various hearings and studies relied on by Vermont concern the need for *procedural* and *administrative* uniformity among the states on such matters as forms and record-keeping, filing and payment mechanisms, and definitions of standards and terms—not the *substantive* validity of flat highway taxes or particular state taxing methods. See, *e.g.*, *Surface Transportation Issues: Hearings Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation*, 98th Cong., 2d Sess. 293 (1984).

Congress may someday move preemptively in this field, though no such action is imminent. In the meanwhile, Congress's inaction—which is all that Vermont has pointed to—is a "treacherous guide to [its] intent"

(*Watt* v. *Alaska*, 451 U.S. 259, 271 n.13 (1981)) and cannot displace the traditional role of this Court.

III. PENNSYLVANIA'S FACIALLY DISCRIMINATORY AXLE TAX CANNOT BE DEFENDED AS A "RATIONAL RESTRUCTURING" OF THE STATE'S HIGHWAY TAX SCHEME.

We showed in our opening brief that Act 234 imposes a new axle tax on interstate commerce (§ 3) while simultaneously lifting the burden of the tax from the shoulders of truckers registered within the State (§ 1). Although Pennsylvania makes a half-hearted attempt to argue that the statute nonetheless is not facially discriminatory, its principal contention is that the discrimination represents merely a "rational restructuring" of the State's highway tax system that was necessary to correct an imbalance in the tax burdens of in-state and out-of-state carriers. In Pennsylvania's view (Br. 17), so long as the aggregate amount of a state's taxes (including registration fees) is higher for in-state trucks, the legislature is free to enact a new tax imposed entirely on out-of-state trucks. As noted above (at 5-7), Pennsylvania's premise rests on a mistaken view of the economic consequences of registration fees. Even if that premise were correct, however, it would not validate the manipulation of Pennsylvania's tax system that accompanied adoption of the axle tax.

This Court has frequently considered the constitutionality of state taxes that were imposed solely or more heavily on interstate commerce. The legal standard developed for evaluating such taxes is the compensatory tax doctrine. Although the Pennsylvania Supreme Court relied on the compensatory tax doctrine in upholding Act 234 (see J.S. App. 33a-34a), the State now acknowledges (Br. 18), as it must (see ATA Br. 20-26), that the axle tax cannot satisfy the requirements of the doctrine.

Pennsylvania's response to this predicament is remarkable. The State begins (Br. 18) by labeling the com-

pensatory tax doctrine a "strawman," even though its own Supreme Court was unable to sustain the tax without invoking that doctrine. Next, it asks this Court to scrap the principle that facially discriminatory taxes can be upheld only if shown to be compensatory and to substitute a lax and ill-defined "rational restructuring" test.

A. This Court has heard Pennsylvania's "add them all up" argument before, and its response has been to adhere to the compensatory tax doctrine. In *Maryland* v. *Louisiana*, for example, Louisiana contended that its first-use tax, which nominally applied to all gas, was designed to equalize competition between in-state and out-of-state interests (451 U.S. at 732). To accomplish this purported "rational restructuring," Louisiana law provided that first-use tax payments would constitute a credit to reduce other taxes on Louisiana gas—as Pennsylvania here has used the axle tax to reduce registration fees. In defense of this discrimination, Louisiana argued:

> [A] state tax cannot be viewed in isolation from the other taxing statutes enacted by the state. Instead, the overall state taxing scheme must be evaluated in determining whether discrimination truly exists. . . . An actual determination whether any discrimination exists requires a careful look at Louisiana's whole taxing structure as well as at the actual effects of the First Use Tax.

Reply of State of Louisiana to Exceptions, *Maryland* v. *Louisiana*, *supra*, at 41, 43 (Dec. 5, 1980). And in upholding Louisiana's first-use tax, the Special Master stated—in terms substantially identical to Pennsylvania's assertion in this case—that the validity of the tax turned on "the effect of the various credits, given the totality of the operation of the state tax provisions" (451 U.S. at 758). This Court rejected that approach, however, holding that the first-use tax discriminated against interstate commerce and could not be justified as a compensatory tax; because the Louisiana tax by its very structure

was discriminatory, it was not necessary to determine "how unequal the [t]ax is before concluding that it unconstitutionally discriminates" (*id.* at 760).

In *Armco*, the Court again rejected an argument (see *Armco* W. Va. Br. 78-84) that a discriminatory tax should be evaluated in the context of the State's overall tax system and was valid because of other, larger levies paid by in-state taxpayers. Like the Pennsylvania Supreme Court in this case, the West Virginia Supreme Court upheld the challenged wholesaling tax on the ground that "no . . . discrimination in favor of local, intrastate commerce occurred because taxpayers manufacturing in the State were subject to a far higher tax" (467 U.S. at 642). Applying the compensatory tax doctrine, this Court reversed, holding that the larger manufacturing tax could not justify the lesser wholesaling tax that was discriminatorily imposed solely on out-of-state companies (*id.* at 642-645).

Inexplicably, Pennsylvania now cites *Maryland* v. *Louisiana* as the sole authority in support of its "rational restructuring" test. See Pa. Br. 16-17. But that decision plainly refutes Pennsylvania's argument, which is no more tenable here than was West Virginia's reliance in *Armco* (Br. 78-79) on the same passages. In finding that the Louisiana first-use tax discriminated against interstate commerce, the Court looked to related sections of the State's code, explaining that "[a] state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme" (451 U.S. at 756). It was necessary to consider the challenged tax in relation to those other provisions to ensure that the State did not, by clever manipulation or indirection, evade the requirements of the Commerce Clause. Once the Court concluded that the first-use tax was discriminatory, however, it applied the compensatory tax doctrine as the governing standard to determine whether the State could justify the tax. *Id.* at 758-760. The same analysis is controlling here. Like the Louisiana first-use tax, the Pennsylvania axle tax dis-

criminates against out-of-state taxpayers, viewed in light of the simultaneous offsetting reductions in Pennsylvania's registration fees, and must satisfy the compensatory tax doctrine in order to be sustained.

B. There is good reason why this Court has never accepted Pennsylvania's vague "add them all up" approach. The compensatory tax doctrine is directly responsive to the concerns that underlie the Commerce Clause. A tax that discriminates against interstate commerce is presumptively unconstitutional because it threatens the very object of the Clause: to protect the nation against the economic inefficiency and inter-state antagonism that protectionist legislation inevitably generates. Such a tax may be upheld despite its facial invalidity only where a non-discriminatory economic effect is unambiguous, *i.e.*, only where the tax at issue is imposed on a "substantially equivalent event" (*Maryland* v. *Louisiana*, 451 U.S. at 759) and results in "strict . . . equality" (*Halliburton Oil*, 373 U.S. at 73) for in-state and out-of-state taxpayers. As the Court explained in *Silas Mason*, 300 U.S. at 584, the compensatory tax doctrine ensures that "the sum is the same when the reckoning is closed."

By contrast, Pennsylvania's amorphous "rational restructuring" test provides no safeguards for ensuring that "the sum is the same" and would open the Commerce Clause to ready evasion. Pennsylvania apparently believes that the Constitution countenances a discriminatory tax whenever a state can point to other tax laws that impose a higher financial burden on in-state taxpayers than out-of-state taxpayers. But a state ordinarily will collect more in total tax revenues from in-state than out-of-state taxpayers because it confers a larger quantity of benefits and services on local residents. Thus, it would be the rare case in which a state would be unable to satisfy Pennsylvania's test for "protecting" interstate commerce.

This case well illustrates the adverse consequences of adopting a "rational restructuring" approach. Under

that approach, a highway tax that discriminates against out-of-state trucks would be sustained whenever the combination of registration fees and other highway taxes paid to the state by out-of-state trucks was less than that paid by in-state trucks. Since the Pennsylvania registration fee for heavy trucks is $945, the State's theory would support not just the existing axle tax of $180, but much greater levies. And if Pennsylvania may impose a large discriminatory tax under this theory, so could every other state.

Beyond this, Pennsylvania's unbounded "rational restructuring" approach would not be judicially manageable. A court would have no way of determining whether the effects of two (or more) different taxes "rationally" counterbalance each other so that the "restructuring" does not treat interstate commerce "unfairly" despite the ostensible facial discrimination. See *Commonwealth Edison*, 453 U.S. at 627-628; J. Hellerstein, *State Taxation: Corporate Income and Franchise Taxes* ¶ 4.12[5], at 150 (1983). Once the Court started down this road, it would be drawn inevitably into making economic comparisons between numerous dissimilar state tax laws to assess whether the aggregate burden on out-of-state interests exceeded that on in-state interests. The Court has refused to engage in precisely this sort of analysis under the compensatory tax doctrine (see *Armco*, 467 U.S. at 643), and there is no greater reason to do so in the guise of making a "rational restructuring" inquiry.

C. On top of these defects, Pennsylvania's freewheeling test offers absolutely no assurance that the legislature has in fact engaged in "rational restructuring" when it adopts a discriminatory tax. Instead, the test puts a premium on the ability of the state's lawyers to scour the tax code and "rationally restructure" the state's tax system *after* a discriminatory enactment has been challenged. Pennsylvania seems to concede as much. Relying on inapposite cases decided under the Equal Protection Clause, it argues (at 19-21) that there need not actually be evidence in the record of a "rational re-

structuring" in order for a discriminatory tax to be upheld. This Court, however, has never accepted appellate counsel's *post hoc* rationalizations to immunize a discriminatory state tax against a Commerce Clause challenge.

Again, this case shows the grave dangers to Commerce Clause policies in adopting Pennsylvania's "rational restructuring" substitute for the compensatory tax doctrine. If anything is clear from the record in this case, it is that the Pennsylvania legislature did *not* purport to be undertaking a "rational restructuring" of highway taxes when it enacted the axle tax. See ATA Br. 24-25, 27. Chief Justice Nix so concluded in his dissent below (J.S. App. 41a-42a), and the majority opinion pointed to no evidence that the legislature actually considered that to be its objective. In fact, "we need not guess at the legislature's motivation" (*Bacchus Imports*, 468 U.S. at 271) here, because the statute adopting the axle tax expressly declares that the purpose of the tax is "to provide for the creation of jobs and the rehiring of [Pennsylvania's] unemployed" (J.S. App. 84a). Nowhere does the statute mention a rational readjustment of disparate tax burdens.

Moreover, the economic effects of the axle tax belie the notion that the statute represents a "rational restructuring." The registration fees that allegedly justified the discriminatory axle tax raised a total of only *$48.5 million* in the 1981-1982 licensing year (see Pa. Br. App. 1a), while the newly-created axle tax raises some *$68 million* annually from out-of-state trucks (J.S. App. 34a). The axle tax thus was no mere adjustment of the State's highway tax scheme to eliminate inequity in the amount of registration fees. Likewise, anomalies in the registration fee reductions accompanying the axle tax, which result in certain lighter trucks paying a higher registration fee than heavier trucks (see ATA Br. 25 n.8), are utterly inconsistent with Pennsylvania's asser-

tion that the statute embodies a "rational restructuring."

On the other hand, Pennsylvania has adduced *nothing* to indicate that the legislature was "rationally restructuring" its highway tax system. The State merely argues in the abstract (at 15-16) that relative tax burdens "can" change over time and that a legislature therefore "can" decide to reallocate the impact of the tax. It does not argue, however, that either of those circumstances in fact occurred here. And even now the State has presented no proof that out-of-state trucks were not paying their fair share of highway costs prior to the axle tax or that the size and structure of the axle tax were carefully designed to correct any such imbalance.

D. Pennsylvania also asserts in a passing footnote (Br. 16 n.15) that the axle tax is valid because the State, instead of simultaneously reducing registration fees to offset the axle tax for Pennsylvania-based trucks, "could properly have accomplished the same result in two steps . . . [if it had] first imposed the Axle Tax on all trucks and later reduced the registration fee." But a state surely could not circumvent the requirements of the Commerce Clause by adopting a two-step discriminatory tax and delaying implementation of the second step in an effort to conceal the discrimination.

It may well be possible to imagine other situations where a state, in unrelated legislation enacted at separate times, both imposes a tax on interstate and local commerce and reduces a tax imposed solely on local commerce. A plaintiff challenging such a tax scheme under the Commerce Clause would bear the burden of proving that the taxes were linked in an effort to discriminate against interstate commerce—a burden that might be difficult to satisfy if the hiatus between the two enactments were sufficiently long and other evidence of discriminatory intent were lacking. But the outcome of

such a hypothetical case has little bearing on the constitutionality of protectionist legislation such as Act 234, which *simultaneously* and *purposely* imposed a new tax on interstate commerce while relieving local residents of its burdens. Pennsylvania can hardly defend the axle tax on the ground that it "might" have taken different action that "might" be constitutional.

IV. PENNSYLVANIA IS NOT ENTITLED TO RETAIN TAXES UNCONSTITUTIONALLY EXACTED.

Implicitly acknowledging the infirmity of its position on the merits, Pennsylvania devotes considerable attention (Br. 35-41) to additional issues that it believes would be open on remand. Contrary to Pennsylvania's assertion, however, no remand is necessary to determine that the challenged taxes discriminate in a manner prohibited by the Commerce Clause. See page 4, *supra*. Moreover, Pennsylvania's severability and prospectivity arguments are plainly wrong and cannot justify the State's retention of the taxes unconstitutionally imposed.

Pennsylvania's arguments that no refund is necessary in this case are flatly inconsistent with the State's position in the proceedings below. Pennsylvania entered into six separate stipulations (see, *e.g.*, J.A. 111-112, 151) providing that "all affected motor carriers will be entitled to receive a refund" of the marker fee and axle tax if ATA "prevail[s] upon the merits" of its challenge. (These stipulations were enforced by the Commonwealth Court. See J.S. App. 62a, 73a.) Pennsylvania disingenuously suggests (Br. 41 n.36) that "the merits" include the issues of severability and prospectivity rather than just the substantive validity of the taxes. That argument is belied by the literal language of the stipulations, which makes clear that a decision for ATA "on the merits" is one "in which [the challenged tax] shall have been declared unconstitutional or its enforcement enjoined" (J.A. 112, 151). Pennsylvania's interpretation also renders the stipulations meaningless; un-

der the State's view, they do nothing more than assure a refund to truckers who would otherwise be entitled to one without regard to the stipulations. And Pennsylvania conveniently ignores the fact that it received valuable consideration from ATA as the *quid pro quo* for the stipulations: ATA withdrew its motions seeking to enjoin collection of the discriminatory taxes—motions that would have relieved out-of-state truckers from having to pay the unconstitutional taxes that the State now refuses to refund. See J.A. 113, 152.

These considerations aside, this Court already has rejected Pennsylvania's "severability" argument. *Bacchus Imports* held that "'severance' would not relieve the harm inflicted during the time [the discriminatory tax was actually in effect]" (468 U.S. at 268 n.7). Likewise, in *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239, 247 (1931), the Court found it "well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law" is not afforded an adequate remedy by a belated "increase of the taxes which the others should have paid."

Pennsylvania's prospectivity argument is even more unsound, since it does nothing at all to remedy the discrimination that has occurred over the last six years. The fact that the State claims to have relied on *Aero Mayflower* (while ignoring more recent cases such as *Complete Auto*) does not compel a prospective decision here at the expense of the purposes of the Commerce Clause. And certainly it has always been understood that a decision in a case, whether prospective or retrospective as to others, has full retroactive force as to the parties before the Court.

In ATA's pending petition for certiorari in *American Trucking Associations, Inc.* v. *Conway*, No. 86-69 (filed July 21, 1986), copies of which have been sent to counsel in this case, we have demonstrated that past decisions of

this Court compel a refund of taxes exacted in violation of the Commerce Clause. Those decisions squarely foreclose Pennsylvania's contentions here. See, *e.g.*, *Ward* v. *Love County*, 253 U.S. 17, 24 (1920).

CONCLUSION

The judgment of the Supreme Court of Pennsylvania should be reversed.

Respectfully submitted.

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